Supreme Court, U.S.
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No. _____

**In The Supreme Court**
**of the**
**United States**

October Term, 1998

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POLMAR FISHERIES, INC.,
*Petitioner,*
vs.
SUSAN VIOLA HURLBURT,
*Respondent.*

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**On Writ of Certiorari to**
**the United States Court of Appeals**
**for the Ninth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Must a maritime worker be connected with a vessel or vessels "in navigation" when injured to be considered a seaman for purposes of the Jones Act?

2. Can a vessel be in navigation, so as to expose a workman to the hazards of the sea for purposes of liability under the Jones Act, at a time when the vessel is both legally and physically incapable of putting to sea, and the workman's presence on the vessel is not related to employment on any other vessel or fleet of vessels in navigation?

3. Can an employer be held liable under the Jones Act to an injured employee solely because the employee is injured on a vessel in navigation, without regard to other circumstances bearing on whether the employee is a seaman or a harbor worker?

4. Can the question of seaman status be taken from the trier of fact when there are circumstances from which a reasonable person might conclude that the injured workman was not a seaman at the time of his injury?

## LIST OF PARTIES

The parties to the proceeding in the District Court and the Court of Appeals were plaintiff/appellee Susan Viola Hurlburt and defendants/appellants Polmar Fisheries, Inc. and Northland Fisheries, Inc., both Washington corporations. The fish processing vessel F/V NORTHLAND was also named in the caption of the complaint, but was never arrested and hence never became a party. The only parties to this Petition for Writ of Certiorari are Petitioner Polmar Fisheries, Inc., and Respondent Susan Viola Hurlburt.

## RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Polmar has no parents, wholly-owned or otherwise. Although certain stockholders of Polmar may own stock in other companies as well, Polmar as an entity does not own stock in any other corporation and therefore has no subsidiaries, wholly-owned or otherwise.

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Polmar Fisheries, Inc. prays for issuance of a writ of certiorari to review the Memorandum Decision Filed in these proceedings by the Ninth Circuit Court of Appeals on October 8, 1998.

## JURISDICTION IN THE COURTS BELOW

Respondent Susan Hurlburt ("Hurlburt") brought this action against Petitioner Polmar Fisheries ("Polmar") and Northland Fisheries, Inc. ("Northland Fisheries") under the Jones

Act, 46 U.S.C. §688, and general maritime law, to recover for injuries which she allegedly suffered on the fish processing vessel F/V NORTHLAND. The District Court exercised jurisdiction under 28 U.S.C. §1333(1). The District Court entered its final judgment in favor of Hurlburt on April 10, 1997. Polmar and Northland Fisheries both appealed. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. §1291.

## REPORTS OF OPINIONS BY OTHER COURTS

Hurlburt suffered a back injury on May 17, 1995, while the NORTHLAND was tied to a dock undergoing a major structural modification known as a "retrofit". She suffered a hand injury after the vessel had resumed processing. Hurlburt sought recovery as a seaman from both Polmar and Northland Fisheries for both injuries.[1] She did not assert a claim against either entity under Section 5(b) of the Longshore and Harbor Workers' Compensation Act (the "Longshore Act" or "LHWCA"), 33 U.S.C. §905(b).

The action was tried to the District Court on March 3-4, 1997. On April 11, 1997, the District Court entered findings of fact, conclusions of law, and a judgment holding that Polmar and Northland Fisheries were both liable for both injuries. The sole basis for liability was negligence under the Jones Act. There was no finding of unseaworthiness or liability under Section 5(b) of the Longshore Act.

Polmar and Northland Fisheries filed a Notice of Appeal on April 23, 1997. Hurlburt did not appeal. The Ninth Circuit Court of Appeals filed a Memorandum Decision on October 8, 1998, which held that Polmar, rather than Northland Fisheries, was liable for the back injury, and Northland Fisheries, rather than Polmar, was liable for the hand injury. The Jones Act was again the sole basis for liability. Polmar filed a motion for reconsideration on October 20, 1998. The Court of Appeals

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[1] Hurlburt suffered a third injury with respect to which the parties concluded a settlement.

denied Polmar's motion by order dated November 6, 1998. Polmar filed for a Motion For Stay of Mandate Pending Petition For Certiorari on November 12, 1998. The Court of Appeals granted Polmar's Motion for Stay of Mandate by order dated November 27, 1998.

## JURISDICTION OF THE SUPREME COURT

This Petition seeks review of the Memorandum Decision filed by the Court of Appeals on October 8, 1998, under the caption *Susan Viola Hurlburt v. NORTHLAND F/V, Polmar Fisheries, Inc., and Northland Fisheries, Inc.,* No. 97-35438. Polmar's motion for reconsideration of that ruling was denied November 6, 1998. This Petition invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254(1).

## CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY INVOLVED

The issues raised by this Petition For Writ of Certiorari concern the relationship between the Jones Act, 46 U.S.C. §688, and the following provisions of the Longshore Act: 33 U.S.C. §§902(3)(G), 902(4), 903(a), 904(a), and 905(a) - (b). Petitioner also contends that 46 CFR §§28.500(c), 501, and 530, of which the meaning is not disputed by the parties, are relevant to how this case should be decided. These statutory and regulatory provisions are set forth verbatim in the Appendix to this Petition pursuant to Rule 14.1(k) of the Supreme Court Rules.

## STATEMENT OF THE CASE

**A. Statement of Facts**: - Polmar and Northland Fisheries are separate corporations. Northland Fisheries was the owner and operator of the NORTHLAND. Polmar is a management company which provides administrative services to various shipowning companies, including Northland Fisheries. Polmar does not own or operate any vessels.

Hurlburt's employment on the NORTHLAND began in the winter of 1993, when she and her husband responded to a newspaper advertisement soliciting applications for employment. They met with Roger Ortman, a personnel

director employed by Polmar who is responsible for hiring crew on behalf of the shipowning companies managed by Polmar. Mr. Ortman hired the Hurlburts to work on the NORTHLAND for the salmon processing season[2] beginning in January of 1994. Mr. and Mrs. Hurlburt each signed a crew contract with Northland Fisheries for that work.

The Hurlburts were originally hired to work as factory processors for $6.00 per hour. Mrs. Hurlburt was promoted to the position of second cook, and her pay was increased from $6.00 per hour to $75.00 per day. She executed a new crew contract with Northland Fisheries to reflect those changes. From that time onward she was paid a daily rate rather than an hourly rate for the work which she did while the vessel was processing.

The Hurlburts returned to the NORTHLAND for the salmon processing season which began in January, 1995. Mrs. Hurlburt was promoted to the position of head cook, and her wage was raised to $125.00 per day. A new contract was again executed between Mrs. Hurlburt and Northland Fisheries to reflect those changes.

The January, 1995 season ended near the beginning of March, after which the NORTHLAND returned to Seattle. The Hurlburts and the rest of the crew left the vessel when it reached Seattle. Mr. and Mrs. Hurlburt leased an apartment for six months and found jobs off the boat. The vessel did not resume processing until about June 13, 1995.[3]

Between completion of the salmon season in March and the resumption of processing in June of 1995, the vessel

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[2] As a processing vessel, the NORTHLAND was a floating factory which accepted deliveries from fishing vessels at sea during fishing seasons, and processed the fish for appropriate markets.

[3] The crew contract signed by Mrs. Hurlburt for the June, 1995 season indicated that she reported to the NORTHLAND as a crew member on or about June 13.

underwent a major retrofit. Polmar acted as the general contractor for the retrofit. It hired a variety of subcontractors for different aspects of the job, such as demolition, electrical work, the refrigeration system, and so on. Ernie Marshall, a Polmar employee, was the project manager for the retrofit. Polmar also hired laborers for the retrofit in addition to those employed by subcontractors. The laborers were hired by Roger Ortman in his capacity as Polmar's personnel manager.

Some two months after the Hurlburts had left the vessel, they were told by Roger Ortman that there was work available during the retrofit to get the galley ready for the next processing season. They asked if they could be considered for that job. Ortman said to come aboard and discuss it with Ernie Marshall, the project manager. They did so and were hired. They broke their apartment lease and moved back on the vessel, where they lived rent-free until the retrofit was completed.

Mrs. Hurlburt's back injury occurred on May 17, 1995, during the retrofit, while she and her husband were working as laborers in the ship's galley. Her husband's job on that day was to grind down the galley floor with a jackhammer. Mrs. Hurlburt's job was to place jackhammering debris into a bucket and carry the bucket upstairs to be emptied. Mrs. Hurlburt testified that her lower back snapped as she was attempting to put the bucket down on a stair during one of those trips.

The retrofit was not completed until June 10, twenty-four days after Mrs. Hurlburt's back injury. The vessel then prepared to sail to Alaska for the next salmon processing season. On June 13, 1995, Mrs. Hurlburt accepted employment as a cook on the vessel. Her hand injury occurred during the processing season after the retrofit was completed.

**B. The Decision of the District Court**: - Polmar and Northland Fisheries contended that they were legally separate entities, and that Hurlburt was a harbor worker rather than a seaman when the back injury occurred. They did not dispute that Hurlburt was a seaman when the hand injury

occurred. Polmar contended that Hurlburt was employed by it rather than Northland Fisheries when the back injury occurred, and that it was immunized from liability for that injury under Section 5(a) of the Longshore Act, 33 U.S.C. §905(a), because it had secured the payment of compensation as required by Section 4 of the Longshore Act, 33 U.S.C. §904. Polmar contended that it was not liable for the hand injury because it was neither Hurlburt's employer nor the owner or operator of the vessel at the time of the hand injury.

Northland Fisheries contended that it was exempt from liability for the back injury because it was the owner/operator of the vessel rather than Hurlburt's employer when the back injury occurred, and no claim had been asserted under Section 5(b) of the Longshore Act, 33 U.S.C. §905(b). Northland Fisheries contended that it was not liable for the hand injury because the negligence, unseaworthiness, and causation necessary to establish liability under the Jones Act and general maritime law were absent.

The District Court ruled that Polmar and Northland Fisheries were both liable for both injuries under the Jones Act. The Court made no attempt to differentiate the liability of Polmar from that of Northland Fisheries, because it found that the two companies were "one and the same for purposes of this lawsuit...."

**C. The Decision of the Court of Appeals**: - The Court of Appeals held, reversing the District Court, that Polmar and Northland Fisheries were separate entities. Polmar was Hurlburt's sole employer when the back injury occurred, and Northland Fisheries was Hurlburt's sole employer when the hand injury occurred. Therefore, under the Jones Act, Northland Fisheries could not be held liable for the back injury and Polmar could not be held liable for the hand injury.

The Court held nevertheless that Polmar was liable under the Jones Act for the back injury. The Court affirmed as not clearly erroneous the District Court's finding that the vessel was "in navigation" during the retrofit. Then, solely on the basis of

that affirmation, the Court ruled that Hurlburt was a seaman when the back injury occurred. The Court neither considered nor remanded to the District Court for consideration of other circumstances relating to Hurlburt's status. The Court affirmed that Northland Fisheries was liable for the hand injury because the District Court's findings as to negligence and causation were not clearly erroneous.

**Stay of Mandate**: - Polmar filed for a Motion For Stay of Mandate Pending Petition For Certiorari under 28 U.S.C. §2101(f) and Rule 41 - 1 of the Federal Rule of Appellant Procedure. Under FRAP 41(b),

> The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

Under Circuit Rule 41-1 of the Rules of the Ninth Circuit Court of Appeals,

> [A] motion for stay of mandate pursuant to FRAP 41(b), pending petition to the Supreme Court for certiorari, will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.

The considerations to be applied in ruling upon a petition for writ of certiorari are governed by Rule 10 of the Rules of the Supreme Court. Rule 10(c) states in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> ***

> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Polmar contended that even if the vessel had been in navigation when the back injury occurred, which it denied, that circumstance alone would not be sufficient to make Hurlburt a seaman. The record contained a substantial amount of other evidence as to Hurlburt's status which the District Court chose not to consider because of its erroneous conclusion that Polmar and Northland Fisheries were the same entity. The Court of Appeals' decision, holding that Hurlburt was a seaman merely because of the vessel's status, without regard to other circumstances of Hurlburt's employment, presents substantial questions as to which there is good cause for review. The Court of Appeals agreed and issued an order staying the mandate on November 27, 1998.

This Petition for Writ of Certiorari involves only the liability of Polmar for the back injury. Polmar's liability turns upon whether Hurlburt was a seaman or a harbor worker when the back injury occurred.

## REASONS FOR GRANTING THE WRIT

### I. REVIEW IS NEEDED TO RESOLVE UNCERTAINTIES WHICH REMAIN AS TO DIFFERENCES BETWEEN SEAMEN AND WORKERS WHO ARE COVERED UNDER THE LONGSHORE ACT.

The Jones Act, which provides a cause of action in negligence for a "seaman" injured in the course of his employment, does not define the term "seaman." 46 U.S.C. §688(a). Congress provided some content to seaman status in 1927, when it enacted the Longshore and Harbor Workers' Compensation Act, 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§901-950. The Longshore Act provides the exclusive remedy of scheduled compensation for injury to a broad range

of land-based workers. However, it explicitly excludes from coverage "a "master or member of a crew" of any vessel. 33 U.S.C. §902(3)(G).

The phrase "master or member of a crew", as used in §902(3), is deemed equivalent to the term "seaman" as used in the Jones Act. It excludes from LHWCA coverage those maritime workers who are properly covered under the Jones Act. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 347 (1991); Chandris v. Latsis, 515 U.S. 347, 355-56 (1995).

However, the line between land-based and sea-based workers has proven far more difficult to draw in practice than in theory. "The federal courts have struggled over the years to articulate generally applicable criteria to distinguish among the many varieties of maritime workers...." Chandris v. Latsis, *supra*, 515 U.S. at 356. Except for a series of cases decided in the late 1950's[4], the Supreme Court had until recently left the differentiation of Jones Act and LHWCA status up to the lower federal courts. "Unfortunately, as a result, 'the perils of the sea, which mariners suffer and shipowners insure against, have met their match in the perils of judicial review.'" Chandris v. Latsis, *supra*, 515 U.S. at 356, citing Gilmore & Black, The Law of Admiralty (2d ed. 1975), §6-1, p.272.

The Supreme Court has therefore recognized in recent years that issues of status under the Jones Act and the Longshore Act involve "important questions of federal law which...should be settled by this Court...." Supreme Court Rule 10(c).

Thus in McDermott International, Inc. v. Wilander, *supra,* the Court considered the question of whether a worker who is otherwise connected to a vessel in navigation must aid

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[4] Gianfala v. Texas Co., 350 U.S. 879 (1955); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Grimes V. Raymond Concrete Pile Co., 356 U.S. 252 (1958)(per curiam); Butler v. Whiteman, 356 U.S. 271 (1958).

in the navigation of the vessel to be considered a seaman. The Court stated that it was necessary to grant review because:

> Our wayward case law has led the lower courts to "a myriad of standards and lack of uniformity in administering the elements of seaman status."..."Diderot may very well have had the previous Supreme Court cases in mind when he wrote, 'We have made a labyrinth and got lost in it: We must find our way out.'"

498 U.S. at 353, citing Engerrand & Bale, 24 S.Tex. L.J. at 494, and Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054, 1060 (7th Cir. 1984).

Four years later in Chandris v. Latsis, *supra*, the Court reviewed the question of whether a supervising engineer employed by a fleet of vessels could be considered a seaman for purposes of an eye injury which he suffered shortly before sailing on one of the vessels in the fleet. The purpose in granting review was to clarify the "labyrinthine" case law, particularly as to "what employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act." 515 U.S. at 349-50 and 356 (citations omitted).

However, Chandris v. Latsis was not enough. In Harbor Tug & Barge Co. v. Papai, 520 U.S. 548 (1997), the Court again granted review to consider the question of seaman status as applied to a worker who took short-term job assignments for various employers through a union hiring hall, and was injured while painting a tug at dockside. The Court granted review because:

> Adjudication to determine whether a maritime employee is a seaman under the Jones Act, or a maritime employee covered by the Longhore and Harbor Workers' Compensation Act, continues to be of concern in our system. The distinction between two mutually exclusive categories can be difficult to implement, and many cases turn on their specific facts.

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> Our statement in [Chandris v. Latsis], that a worker may establish seaman status based on the substantiality of his connection to "an identifiable group of...vessels" in navigation, has been subject to differing interpretations, and we seek to provide clarification.

520 U.S. at 550 (citations omitted). See also Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991)(review granted to determine whether a maritime worker whose occupation is one of those enumerated in the Longshore Act may yet be a seaman under the Jones Act); and Ingalls Shipbuilding, Inc. v. Director, 519 U.S. 248 (1997)(review granted as to what is a "person entitled to compensation" under Section 33(g) of the Longshore Act, 33 U.S.C. §933(g)).

Despite the recent efforts of this Court, concerns remain as to the tests for status under the Jones Act and the Longshore Act. Those concerns are manifest in the present case. This Court has long recognized that the intent of Congress in enacting the Jones Act was to provide a remedy for workers whose employment exposes them to the perils of the sea. Yet the Ninth Circuit held that Hurlburt was entitled to recover under the Jones Act even though, at the time of her injury, she had no connection whatever to any vessel that was capable of putting to sea. Moreover, this Court has long recognized that seaman status cannot be conferred merely by the occurrence of an injury on a vessel in navigation.[5] This Court has also insisted that except in cases which involve the application of legal standards to undisputed facts, the question of seaman status must be addressed initially by the trier of fact. Yet the Ninth Circuit held that Hurlburt was entitled to recover under the Jones Act merely because she was injured on a vessel in navigation, without allowing the trier of fact to consider other

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[5] Otherwise, every longshoreman injured while loading or unloading a cargo on a vessel in navigation, and every harbor worker injured while making repairs to a vessel in navigation, would be entitled to sue under the Jones Act.

circumstances bearing on her employment status. Therefore, within the meaning of Supreme Court Rule 10(c), the Court of Appeals has both "decided an important question of federal law which has not been, but should be, settled by this Court," and has "decided a federal question in a way that conflicts with the applicable decisions by this Court."

## II. CLARIFICATION IS NEEDED AS TO THE REQUIREMENT THAT FOR THE JONES ACT TO APPLY, THE WORKER'S CURRENT EMPLOYMENT MUST INVOLVE A SUBSTANTIAL CONNECTION TO A VESSEL IN NAVIGATION.

The purpose of the Jones Act was to remove the bar created by The Osceola, 189 U.S. 158 (1903), so that injured seamen would have the same rights to recover for negligence as other tort victims. Wilander, *supra*, 498 U.S. at 342. Congress is now understood to have intended that the term "seaman", as used in the Jones Act, would encompass all persons regarded as "seamen" or "mariners" under general maritime law. See Wilander, *supra*, 498 U.S. at 342; Chandris v. Latsis, *supra*, 515 U.S. at 355. Even before the Jones Act, it was recognized that the qualifications for seaman status include an employment-related connection to a vessel in navigation:

> The term "mariner" includes all persons employed on board ships and vessels **during the voyage** to assist in their navigation and preservation, or to promote **the purposes of the voyage**.

Benedict, *American Admiralty* §278, p.158 (1850)(emphasis added). See also Wilander, *supra*, 498 U.S. at 345-47, and the cases cited therein. This historical emphasis upon connection to a vessel in navigation has been preserved by modern authorities:

> [A] seaman is a mariner of any degree, who lives his life upon the sea. It is enough that what he does affects "the voyage and welfare of the ship **when she is upon a voyage**."

Warner v. Goltra, 293 U.S. 155 (1934), citing The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916) (emphasis added).

> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a **vessel in navigation**.

Wilander, *supra*, 498 U.S. at 354 (emphasis added).

> The key to seaman status is employment-related connection to a **vessel in navigation**.

*Id.*, 498 U.S. at 355 (emphasis added).

Thus, seaman status requires more than just an employment-related connection to a vessel or craft. The connection must be to a vessel **in navigation**. In determining whether a vessel is in navigation, courts must be guided by the purpose of the substantial connection requirement:

> The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress, and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the **perils of the sea.**

Chandris v. Latsis, *supra*, 515 U.S. at 368-69 (emphasis added).

The decision of the Court of Appeals is wholly inconsistent with the purpose of the substantial connection requirement as articulated in Chandris v. Latsis. The evidence at trial was undisputed that the retrofit cost more than twice the purchase price of the vessel.[6] Substantial portions of the ship's structure were demolished and rebuilt. Much of the ship's deck

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[6] The retrofit cost approximately $2.1 million, compared with a purchase price of approximately $900,000.

was removed. The entire fish-processing factory was gutted, and most of the fish-processing machinery was either rebuilt or replaced.[7] Although significant portions of the vessel had been rebuilt by the time of Hurlburt's injury, there were other portions, including the propulsion system, which remained incomplete. In particular, the main fuel oil tank vents had not been installed. The ship's engines were incapable of drawing fuel and were therefore inoperable. Consequently, the vessel was physically incapable of putting to sea. She could neither sail under her own power nor conduct normal processing operations.

Moreover, the structural alterations performed during the retrofit added more than 100 tons of steel to the vessel, increasing its overall weight by more than 8%. This again is undisputed. Because the alterations were so extensive, the vessel was required by Coast Guard regulations to be recertified for stability before it could legally put to sea. 46 CFR §28.501. In order to obtain a new stability letter, the vessel had to pass stability tests administered by a naval architect. The stability tests had not even begun when Mrs. Hurlburt injured her back. The vessel was therefore legally as well as physically incapable of putting to sea, because it did not have the stability letter required by the Coast Guard regulations.

Courts have recognized that a worker with the requisite connection to a vessel in navigation retains his seaman status if injured in the course of his employment while temporarily off the vessel. O'Donnell v. Great Lakes Dredge & Dock Co.318 U.S. 36, 42-43 (1943). However, this is not such a case. It is undisputed that Hurlburt never had any connection to any vessel other than the NORTHLAND. Therefore, during the retrofit, Hurlburt had no connection whatever to any vessel in navigation.

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[7] Since the vessel was itself a processing vessel, it could not perform its mission while the processing machinery was being removed and replaced.

Hurlburt worked as a seaman on the vessel before and after the retrofit, when the vessel was clearly in navigation. However, Hurlburt was employed on those occasions in a different job by a different employer than during the retrofit. Her employment before and after the retrofit is therefore irrelevant. This Court has made it clear that the "requisite connection to a vessel in navigation" must exist at the time of the injury. It cannot be supplied by other employment before or after the injury, with the same employer or different employers.

> When a maritime worker's basic assignment changes, his status changes.

Chandris v. Latsis, *supra*, 515 U.S. at 372.

> [T]he employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different "essential duties" than his previous ones.

Papai, *supra*, 520 U.S. at 556. Moreover, Mrs. Hurlburt's employment before and after the back injury was not with Polmar, who employed her during the retrofit, but rather with Northland Fisheries.

> Considering prior employment with independent employers in making the seaman status inquiry would undermine "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular work day begins."

Papai, *supra*, 520 U.S. at 558.

In summary, Congress made a deliberate choice under the Jones Act to provide a particular remedy to seafaring workers whose employment exposes them to the hazards of the

sea. With equal deliberation, Congress chose under the Longshore Act to exclude land-based workers from Jones Act coverage. See Wilander, *supra*, 498 U.S. at 347. The decision of the Court of Appeals undermines the statutory scheme, and promotes confusion and uncertainty as to the respective coverages of the two Acts, by extending Jones Act coverage to a worker whose only connection at the time of her injury was to a vessel that was both physically and legally incapable of putting to sea, and was therefore incapable of exposing her to the seafaring hazards which the Jones Act was intended to redress.[8]

## III. CLARIFICATION IS NEEDED AS TO THE TOTALITY OF CIRCUMSTANCES WHICH MUST BE CONSIDERED IN DECIDING WHETHER THE WORKER IS COVERED UNDER THE JONES ACT OR THE LONGSHORE ACT.

In International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), this Court held that a longshoreman who was injured while stowing cargo on a vessel which did not employ him, but which was moored at a dock in navigable waters, could recover under the Jones Act because "we cannot believe that Congress willingly would have allowed the protection of men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." 272 U.S. at 52.

By holding that Hurlburt was a seaman merely because the vessel was in navigation, the Court of Appeals effectively followed Haverty. However, Haverty has long been repudiated by this Court:

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[8] It is not enough that the vessel was moored at a dock in navigable waters. Every longshoreman who is injured on a vessel while loading or unloading cargo is exposed to the same peril.

> In 1946, the Court belatedly recognized that Congress had acted, in passing the LHWCA in 1927, to undercut the Court's reasoning in the Haverty line of cases, and to emphasize that land-based maritime workers should not be entitled to the seaman's traditional remedies....

Chandris v. Latsis, *supra*, 515 U.S. at 359, citing Swanson v. Marra Brothers, Inc., 328 U.S.1, 6 – 7 (1946).

Thus, not every worker who is injured on a vessel in navigation can be a seaman for purposes of the Jones Act:

> Land-based maritime workers injured while on a vessel in navigation remain covered by the LHWCA, which expressly provides compensation for injuries to certain workers engaged in "maritime employment" that are incurred "upon the navigable waters of the United States," 33 U.S.C. §903(a)...Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured....

Chandris v. Latsis, *supra*, 515 U.S. at 360-61 (citations omitted).

To instruct courts in differentiating between seamen and land-based workers, the Court in Chandris v. Latsis formulated a two-part test which restricts seaman status to employees whose duties contribute to the function of the vessel or the accomplishment of its mission, and who have a connection to a vessel or group of vessels in navigation that is substantial in both duration and nature. 515 U.S. at 368. The Court emphasized that the foregoing tests must be applied not mechanically, according to the presence or absence of a single factor, but rather qualitatively, according to "all relevant circumstances." 515 U.S. at 369. Consideration of "all relevant circumstances" is deemed necessary to "give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers... whose employment does not regularly expose them to the perils of the sea." 515 U.S. at 368. The Court stated:

> In our view, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon."

Chandris v. Latsis, *supra*, 515 U.S. at 370, citing Wallace v. Oceaneering Int'l, 727 F.2d 427, 432 (5th Cir. 1984)("[N]o one factor is determinative. Rather, the total circumstances of an individual's employment musts be weighed to determine whether he had sufficient relation to the navigation of vessels and the perils attendant thereon.")

By failing to remand for consideration of the total circumstances of Hurlburt's employment, the Court of Appeals acted contrary to the decisions of this Court within the meaning of Supreme Court Rule 10(c).

## IV. THE COURT OF APPEALS ACTED CONTRARY TO DECISIONS BY THIS COURT AS TO THE ROLE OF THE TRIER OF FACT IN RULING UPON THE STATUS OF MARITIME WORKERS.

**A. The Record Contains Substantial Evidence That Hurlburt Was Not A Seaman During The Retrofit.** – The evidence was undisputed that all of the jobs performed by Mrs. Hurlburt while the vessel was processing, before and after the retrofit, were memorialized by crew contracts. Moreover, the contracts were identical to each other except for changes in Mrs. Hurlburt's rate of pay and the daily rate of maintenance to be paid in the event of illness or injury. Each contract was signed on behalf of Northland Fisheries and recited that Northland Fisheries was the employer. When the vessel was processing, Mrs. Hurlburt was supervised by the ship's master, who was also an employee of Northland Fisheries. All of her paychecks were issued by Northland Fisheries. All of the W-2 and W-4 forms submitted to the IRS recited that Northland Fisheries was her employer.

There was a significant discontinuity between Mrs. Hurlbert's job as a seaman and her job as a laborer during the retrofit. Mrs. Hurlburt was discharged from her job as a crew

member in March of 1995, when the salmon processing season ended. She and her husband rented an apartment off the vessel and found jobs wholly unrelated to the NORTHLAND. It was not until two months later that they learned of openings as laborers for the retrofit. In order to be hired for the retrofit they had to be approved by Ernie Marshall, the project manager. Mr. Marshall was an employee of Polmar, not Northland. He was not a seaman and had no connection whatever to operation of the vessel in navigation. He had no involvement whatever in the hiring of Mrs. Hurlburt when she worked as a crew member during fish processing seasons.

Unlike the work which she performed while the vessel was processing, Mrs. Hurlburt's work during the retrofit was not covered by a crew contract or other written agreement. She was paid an hourly rate rather than a daily rate. Her paychecks were issued by Polmar rather than Northland Fisheries. Her W-2 and W-4 forms recited that Polmar was her employer. Her work during the retrofit was supervised by Ernie Marshall, Polmar's project manager, rather than the ship's master.

During the retrofit Mrs. Hurlburt did work which she never did while the vessel was processing, such as grinding, painting, chipping and hauling debris that had been jackhammered out of the galley. Other day laborers did the same work of grinding, painting, chipping and hauling debris that Mrs. Hurlburt did during the retrofit. Mrs. Hurlburt even testified that those other laborers, admittedly not crewmen, "started doing my job after I was injured." On the specific day of the back injury, Mrs. Hurlburt and her husband were engaged in tearing up the galley floor with a jackhammer.

The NORTHLAND did not resume processing until the retrofit was completed and a new stability certificate was issued. There was again a substantial discontinuity between Mrs. Hurlbert's work during the retrofit and her job after the retrofit was completed. After the retrofit, Mrs. Hurlburt again executed a written crew contract as she had done before but not during the retrofit. The contract again stated that Northland Fisheries was her employer. She was again paid at a daily rate,

as before the retrofit, rather than the hourly rate she was paid during the retrofit. Her paychecks were again issued by Northland Fisheries rather than Polmar, and her W-2 and W-4 forms again recited that Northland Fisheries was her employer. She stopped doing the chipping, painting, hauling debris, and other laborer's work she had done during the retrofit. She instead resumed her job as a cook. She was again placed under the supervision of the ship's master, an employee of Northland Fisheries, rather than Ernie Marshall, an employee of Polmar.

**B. The Court Of Appeals Erred In Withdrawing The Question Of Seaman Status From The Trier Of Fact.** – Polmar contends it is simply not possible to conclude that Mrs. Hurlburt was a seaman as a matter of law when she injured her back, given the circumstances recited above. Either she was a land-based worker as a matter of law, covered by the Longshore Act, or her status is one which should be determined in the first instance by the trier of fact.

Except for cases where the essential facts are not in dispute, and application of the correct legal standard would permit only one reasonable conclusion to be drawn, this Court has been zealous in preserving the role of the trier of fact in seamen's injury cases. "[I]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of the crew', ...the determination of whether an injured person was a 'member of the crew' is to be left to the finder of fact...." Chandris v. Latsis, *supra*, 515 U.S. at 369, citing Senko v. LaCrosse Dredging Corp, 352 U.S. 370, 374 (1957). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

Thus, after defining the two "essential requirements" for seaman status, this Court admonished in Chandris v. Latsis that the determination of whether those requirements are satisfied, according to "all the relevant circumstances," must be made in the first instance by the trier of fact:

> The jury should be permitted, when determining whether a maritime worker has the requisite

> employment-related connection to a vessel in navigation to qualify as a member of the vessel's crew, to consider all relevant circumstances bearing on the two elements outlined above.

515 U.S. at 369. The Court's admonition applies with equal force when, as here, the case is tried to the court. Because of its conclusion that Northland Fisheries and Polmar were the same entity, the trier of fact did not consider how the circumstances recited above might affect Mrs. Hurlburt's status during the retrofit. Having held that Polmar and Northland Fisheries were separate entities, the Court of Appeals should either have held that Mrs. Hurlburt was a land-based worker as a matter of law when she injured her back, or it should have remanded for consideration of Mrs. Hurlburt's status in light of "all the relevant circumstances of her employment."

To illustrate how the trier of fact might have been misled by its conclusion that Polmar and Northland were the same entity, suppose that Hurlburt had been hired for the retrofit by some company other than Polmar. For example, Mrs. Hurlburt worked off the vessel for two months before returning to work on the retrofit. During those two months she might well have gone to work for some company, such as a pipe-fitting or metal-working contractor, which was later hired by Polmar as a subcontractor on the retrofit. Hurlburt might also have been hired for the retrofit out of a union hiring hall from which she could have received jobs from other employers during her two months off the vessel. The decision in Papai suggests that in such cases, Hurlburt would not have been a seaman. A reasonable trier of fact, having been instructed by the Court of Appeals to treat Polmar and Northland as separate entities, might well have concluded that her circumstances were analogous to the foregoing examples.

By failing to remand the question of status to the trial court, the Court of Appeals acted contrary to the decisions of this Court within the meaning of Supreme Court Rule 10(c), and invaded the province of the trier of fact.

## V. THIS COURT SHOULD ACCEPT REVIEW TO ASSIST MARITIME EMPLOYERS IN PREDICTING WHO WILL BE COVERED BY THE LONGSHORE ACT.

There are two respects in which an employer's ability to plan is implicated with particular force by this case. The first relates to insurance. The Court expressly recognized in Chandris v. Latsis that:

> Our rejection of the voyage test[9] is also consistent with the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers compensation obligations, who will be covered by the LHWCA) before a particular workday begins.

515 U.S. at 363. Polmar and Northland Fisheries provide perfect illustrations of the Court's concern. Northland Fisheries was the owner and operator of the vessel. It obtained standard protection and indemnity insurance to cover injuries suffered by members of the vessel's crew. Polmar provided land-based management services. It obtained compensation coverage as required by Section 4 of the Longshore Act, 33 U.S.C. §904, to cover injuries suffered by its employees while working as harbor workers. Both companies are entitled to know, with more certainty than exists under present law, which of their employees will be covered by which statutory scheme and when.

This case also illustrates the very legitimate concern which companies have in being able to rely upon the requirements of state law to keep their corporate form from being disregarded. Although Polmar bears some relation to Northland Fisheries, it adhered strictly to the requirements of

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[9] The voyage test is the now-repudiated test adopted in Haverty, whereby a worker becomes a seaman merely by being injured on a vessel at some point during its voyage.

state law pertaining to observance of corporate formalities, separation of assets, adequacy of capitalization, financial responsibility, and the other requirements for preserving its corporate separateness. Now that the Court of Appeals has ruled that Polmar and Northland Fisheries must be treated as separate entities, Polmar is entitled to have Hurlburt's seaman status be reconsidered in light of that ruling.

## CONCLUSION

This Court should grant review of the decision by the Ninth Circuit Court of Appeals in order to eliminate confusion and clarify important rules of federal law as to the role of the trier of fact in determining seaman status, the standards to be applied in making that determination, and the evidence which the trier of fact must consider.

DATED this 24th day of March, 1998.

Schwabe, Williamson & Wyatt, P.C.

By _____
Jerome C. Scowcroft,
Counsel of Record

No. _____

**In The Supreme Court**
**of the**
**United States**

October Term, 1998

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POLMAR FISHERIES, INC.,
*Petitioner*,
vs.
SUSAN VIOLA HURLBURT,
*Respondent*.

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FILED
OCT 08 1998
CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR NINTH CIRCUIT

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|---|---|
| SUSAN VIOLA HURLBURT, a seaman, Plaintiff-Appellee, v. NORTHLAND F/V, a vessel; POLMAR FISHERIES, INC., a Washington corporation, Defendants-Appellants. | No. 97-35438<br>D.C. No. CV-95-02066-JET<br>MEMORANDUM* |

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, Senior Judge, Presiding

Argued and Submitted August 6, 1998
Seattle, Washington

Before: D.W. NELSON and KOZINDKI, Circuit Judges, and

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

SCHWARZER, ** Senior District Judge

Northland Fisheries, Inc. (Northland), owner of the vessel F/V NORTHLAND, and Polmar Fisheries, Inc. (Polmar), its managing agent, appeal the judgment holding them jointly liable for Susan Hurlburt's (Hurlburt) back and hand injuries. They challenge the district court's findings that the two defendants are "essentially one and the same for the purposes of this lawsuit"; that the F/V NORTHLAND was "in navigation" at the time of Hurlburt's back injury for purposes of the Jones Act, 46 U.S.C. § 688; and that the injuries to her hand were caused by the negligence of defendants.

The finding that Northland and Polmar were one and the same is clearly erroneous. They were separate corporations and no claim is made that the circumstances warrant piercing the corporate veil. Defendants contend that Polmar was the employer at the time of the back injury in May 1995 and Northland was the employer at the time of the hand injury when the vessel was again at sea, and the record amply supports that contention. Hurlburt does not dispute that each was an employer at those times but simply maintains that the

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** The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by

other was an employer as well, i.e., that they were joint employers. Under the Jones Act, however, only one person, firm, or corporation may be held liable as the employer. See e.g., Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 791 (1949); Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495, 1500 (9th Cir. 1995). The district court erred, therefore, in imposing joint liability on defendants and failing to limit liability for the back injury to Polmar and for the hand injury to Northland.

Defendants next contend that Hurlburt is not entitled to recover for her back injury under the Jones Act because at the time of the injury the F/V NORTHLAND was not in navigation, an essential element of her claim as a seaman. The district court found that the vessel was in navigation. Whether a vessel is "in navigation" is a question of fact, which we review for clear error. See Roper v. United States, 3 68 U.S. 20, 22-23 (196 1).

Defendants rely in their argument on Heise v. Fishing Co. of Alaska, 79 F-3d 903 (9th Cir. 1996), and McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567 (9th Cir. 1992), but their reliance is misplaced. Heise did not address the issue whether the vessel was in navigation. In McKinley, the

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designation.

plaintiff s injury occurred while he was working on the hull of an oil drill ship valued at $45 1,000, that was being converted to a seagoing fish and crab processing ship over a period of seventeen months at a cost of $14 million. See McKinley, 980 F.2d at 568, 570. McKinley is distinguishable. As the court described it, the McKinley "case [was] more analogous to new construction than repair or overhaul." Id. at 571. In contrast, the F/V NORTHLAND underwent a retrofit, primarily of her refrigeration system, which did not change her function, took three months and cost some $2 million. She remained tied alongside the dock and retained her watertight integrity. While reasonable minds might differ, we cannot say that the district court's finding that she was in navigation was clearly erroneous. See Chandris, Inc. v. Latsis, 515 U.S. 347, 374 (1995) ("[V]essels undergoing repairs or spending a relatively short period of time in drydock are still considered to be 'in navigation' whereas ships being transformed through 'major' overhauls or renovations are not.").

Finally, with respect to Hurlburt's hand injury, defendants contend that she failed to prove causation so as to be entitled to recover under the Jones Act. The district court found Hurlburt's hand injury was caused by the negligence of

defendants. We review its finding for clear error. See Resner v. Arctic Orion Fisheries, 83 F.3d 271, 273 (9th Cir. 1996).

"The 'quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence, . . . and even the slightest negligence is sufficient to sustain a finding of liability.'" Ribitzki v Canmar Reading & Bates, Ltd., 111 F.3d 658, 662 (9th Cir. 1997) (quoting Havens v. F/T POLAR MIST, 996 F.2d 215, 218 (9th Cir. 1993)). Hurlburt testified that she was required to wear gloves because she was working with meat and that the gloves caused her hands to become raw and to split and bleed. When she reported the problem to the captain, he said that there was nothing he could or would do and required her to continue working. Hurlburt's husband testified that both he and Hurlburt were required to wear gloves, that Hurlburt's hands were raw, cracked, splitting and bleeding and required bandages on her fingers, and that she never had this problem prior to this trip. Finally, Captain Greiner, a former inspector for the United States Coast Guard, testified that the safety standard used in the factory trawler industry, published by the American Factory Trawler Association, states that "[p]rolonged enclosure of hands . . . in rubber gloves . . . may also lead to skin disorders or infections." The evidence of the required prolonged use of

rubber gloves and the resulting tendency to cause skin disorders or infections was sufficient to establish the requisite causation.

Accordingly, we REMAND for entry of an amended judgment to provide that liability for the hand injury[3] be allocated to Northland, and liability for the back injury and the consequent damages[4] be allocated to Polmar. In all other respects the judgment is AFFIRMED.

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[3] Stated in the district court's conclusion of law No. 6.

[4] Stated in the district court's conclusions of law Nos. 7, 8, and 9.

ENTERED
ON DOCKET
APR __ 1997
By Deputy __/s/ JW__

# United States District Court

Western District of Washington

## JUDGMENT IN A CIVIL CASE

SUSAN VIOLA HURLBURT,
v. Plaintiff,
F/V NORTHLAND;
POLMAR FISHERIES, INC.;
NORTHLAND FISHERIES,
INC.,
Defendants. **CASE NUMBER: C95-2064(C)JET**

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried and heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
Pursuant to the Findings of Fact and Conclusions of Law, the Court finds for the Plaintiff:

1. All Findings of Fact more appropriately termed Conclusions of Law are hereby incorporated as such.
2. The Court has jurisdiction over the parties and subject matter of this action.
3. The plaintiff, at all times material hereto as a seaman and covered under the Jones Act and general maritime law.
4. The F/V Northland, at all times material hereto was in navigation.
5. Plaintiff's hernia was caused by the negligence of the defendants. She is entitled to $10,000.00 as compensation for the pain and suffering she endured.

6. Plaintiff's rash on her hands was caused by the negligence of the defendants. She is entitled to $1,500.00 as compensation for the pain and suffering she endured.
7. Plaintiff is entitled to maintenance from August 2, 1995 through January 3, 1997 at $25.00 per day totaling $12.175.00. Plaintiff has been paid $10,995.64, leaving a balance due of $1,279.36.
8. Plaintiff's back injury was caused by defendants' negligence. Plaintiff is entitled to $95,000.00 as compensation for pain and suffering, mental anguish, and loss of enjoyment of life.
9. Plaintiff is entitled to $80,000.00 as compensation for lost earning capacity.
10. Plaintiff is entitled to the total sum of $183,779.36, together with prejudgment interest at 6.0% from May 17, 1993 until the date of judgment pursuant to 28U.S.C.1961.
11. Plaintiff is entitled to reasonable costs and attorneys' fees.

April 10, 1997
*Date*

BRUCE R. RIFKIN
*Clerk*

Pat LeFrois /s/ Pat LeFrois
*(By) Deputy Clerk*

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By Deputy JW

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SCHWABE, WILLIAMSON & WYATT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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| SUSAN VIOLA HURLBURT, a seaman,<br><br>Plaintiff,<br><br>v.<br><br>NORTHLAND F/V, a vessel; POLMAR FISHERIES, INC., a Washington corporation,<br><br>Defendants. | No. C95-2066(C)JET<br><br>FINDINGS OF FACT AND CONCLUSIONS OF LAW |

THIS MATTER came on for trial to the court Plaintiff was represented by Thomas C. Evans and defendants were represented by Paul N. Daigle. Having heard the testimony of Susan Hurlburt, Ed Hurlburt, Stacey McVay, Bruce Culver, Roger Ortman, Neil Anderson, Kent Shafer and George Greiner, and having read the deposition of Ernest Marshall, and having considered the evidence and argument of counsel, the Court now makes the following Findings of Fact established by a preponderance of the evidence:

## FINDINGS OF FACT

1. Plaintiff Susan Hurlburt is 42 years old. She and her husband, Ed Hurlburt, first hired to work on the F/V Northland as processors. Plaintiff and her husband subsequently were employed as cooks aboard the F/V Northland.

2. The F/V Northland is an 186 feet long fish processor owned by defendant Northland Fisheries, Inc. (Northland). Neil Anderson is the president of Northland.

3. Defendants Northland and Polmar Fisheries, Inc., (Polmar) share the same employees, offices and phone number. Mark Maring is the sole officer and director of Polmar and is the secretary treasurer of Northland.

4. The evidence establishes that the two companies, Northland and Polmar, are essentially one and the same for the purposes of this lawsuit and that Maring controlled both entities.

5. While working as the vessel's cook in February 1995, plaintiff suffered a hernia injury while attempting to lift a 70 lb. box of meat from the vessel's freezer.

6. The evidence establishes that plaintiff was offered no training by the defendant in the lifting of heavy objects. The evidence also establishes that the staffing of the

vessel which provided for only a galley assistant to help the cook prepare meals for approximately 110 crewmen, contributed to plaintiff's injury as did the dark and cramped condition of freezer.

7. The evidence establishes that plaintiff suffered a painful rash on her hands while working aboard the vessel in February 1995, caused by the use of latex gloves or exposure to chemicals. The evidence establishes that, contrary to accepted standards, defendants did not offer to provide different gloves or to remove her from the injury causing environment by providing a different job.

8. After returning from sea, where plaintiff worked as the cook aboard the F/V Northland in March 1995, based on a contract signed February 12, 1995, plaintiff was contacted by Roger Ortman, defendants' personnel director, inquiring whether plaintiff and her husband intended to continue to cook on board the F/V Northland for the upcoming salmon season.

9. Plaintiff and her husband went to work on board the F/V Northland on May 9, 1995. They initially were scraping and grinding the galley floor, and because this was not what they thought they were hired to do, they left the vessel shortly thereafter.

10. Plaintiff and her husband were then again contacted by Roger Ortman and Neil Anderson and they were informed that if they intended to cook for the salmon season, they must return to the vessel shortly. They returned within a few days. During this time, plaintiff was also cleaning staterooms in preparation for the upcoming salmon season. The salmon season commenced on or about June 10, 1995 and plaintiff signed a contract on that date to work as the first cook.

11. Plaintiff suffered an injury to her back on May 17, 1995 while carrying a bucket of debris up the stairs from the galley to the main deck. The evidence establishes that the concrete galley floor was being removed and replaced at the personal direction of Mark Maring and that defendants directed the plaintiff to carry the bucket up the stairs in violation of published standards regarding the lifting and moving of heavy weights.

12. The injury to plaintiff required surgery at L4-5. Plaintiff still suffers from pain due to the injury and will continue to suffer into the future. The injury has now limited plaintiff's work capacity to intermixed sedentary to light/medium. She will no longer be able to work as a cook, either on a vessel or on shore, or to work in her previous field of bartending.

13. On the date of her back, injury, plaintiff and her husband were living aboard the vessel together with at least three other crewmembers while the vessel was being retroffited with blast furnaces. The evidence establishes that she cooked for herself, her husband and other crewmembers during the retrofit and purchased at least some of the food eaten with money provided by Neil Anderson.

14. From approximately March 3, 1995 through June 10, 1995, the F/V Northland was tied up to a pier in the Northlake Shipyard undergoing the installation of new blast furnaces.

15. The upper deck above the now blast furnace was removed and reconfigured to allow the installation of the blast furnace. No work was done which affected the watertight integrity of the vessel, and the vessel remained a fish processor. Although the retrofit cost approximately 2 million dollars, the insured value of the ship only increased 1.275 million from 3.525 million to 4.8 million dollars.

15. During the installation of the new blast furnaces both Northland and Polmar had control of the vessel. Neil Anderson, president of Northland allowed plaintiff to live aboard the vessel, and Mark Maring of Polmar and Northland was directing the work to be done on the vessel.

16. The contracts signed by plaintiff all indicated that they were for at least 120 days duration, provided for maintenance and cure, and for attorneys' fees if disputes arose.

17. Defendants have consistently, arbitrarily, and in bad faith failed to pay the required maintenance and cure and has thus caused plaintiff to be evicted from her home, denied pain medications and to suffer the humiliation of collection proceedings against her. The Court finds that defendants' conduct in this regard was outrageous and intentional.

18. All of plaintiffs injuries were caused solely by defendants' negligence.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. All Findings of Fact more appropriately termed Conclusions of Law are hereby incorporated as such.

2. The Court has jurisdiction over the parties and subject matter of this action.

3. The plaintiff, at all times material hereto was a seaman and covered under the Jones Act and general maritime law.

4. The F/V Northland, at all times material hereto was in navigation.

5. Plaintiff's hernia was caused by the negligence of the defendants. She is entitled to $10,000.00 as compensation for the pain and suffering she endured.

6. Plaintiff's rash on her hands was caused by the negligence of the defendant. She is entitled to $7,500.00 as compensation for the pain and suffering the endured.

7. Plaintiff is entitled to maintenance from August 2, 1995 through January 3, 1997 at $25.00 per day totaling $12,175.00. Plaintiff has been paid $10,895.64, leaving a balance due of $1,279.36.

8. Plaintiffs back injury was caused by defendants' negligence. Plaintiff is entitled to $85,000.00 as compensation for pain and suffering, mental anguish, and loss of enjoyment of life.

9. Plaintiff is entitled to $80,000.00 as compensation for lost earning capacity.

10. Plaintiff is entitled to the total sum of $183,779.36, together with prejudgment interest at 6.0% from May 17,1995 until the date of judgment pursuant to 28 U.S.C. 1961 (a).

11. Plaintiff is entitled to reasonable costs and attorneys' fees.

DATED this 10th day of APRIL 1997.

/s/ Jack E. Tanner
SR. UNITED STATES DISTRICT JUDGE

FILED
NOV - 6 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| SUSAN VIOLA HURLBURT, a seaman, | No. 97-35438 |
| Plaintiff-Appellee, | D.C. No. CV-95-02066-JET |
| v. | **ORDER** |
| NORTHLAND F/V, a vessel; POLMAR FISHERIES, INC., a Washington corporation, | |
| Defendants-Appellants. | |

Before: D.W. NELSON and KOZINSKI, Circuit Judges, and SCHWARZER,* Senior District Judge.

The petition for rehearing is DENIED.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

FILED
NOV 27 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

SUSAN VIOLA HURLBURT, a seaman,

Plaintiff-Appellee,

v.

NORTHLAND F/V, a vessel; POLMAR FISHERIES, INC., a Washington corporation,

Defendants-Appellants.

No. 97-35438

D.C. No. CV-95-02066-JET

**ORDER**

Before: KOZINSKI, Circuit Judge.

Appellants' petition for stay of mandate pending petition for writ of certiorari is GRANTED.

## THE JONES ACT, 46 U.S.C. §688.

**Recovery for injury to or death of seaman.**

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

# THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §§902 (3)(g), 902(4), 903(a), 905(a)-(b)

## § 902. Definitions

**33 U.S.C. §902(3)(G)**

When used in this chapter --

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --

* * *

(G) A master or member of a crew of any vessel;

**33 U.S.C. §902(4)**

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

**33 U.S.C. §903(a)**

**Coverage**

(a) Disability or death; injuries occurring upon navigable waters of the United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

**33 U.S.C. §904(a)**

**Liability for compensation**

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

**33 U.S.C. §§ 905(a)-(b)**

**(a) Employer liability; failure of employer to secure payment of compensation**

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

**(b) Negligence of vessel**

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in

this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

**46 CFR §§ 28.500 (c), 501, 530**

**Subpart E - Stability**

**§ 28.500 Applicability.**

This subpart applies to each commercial fishing industry vessel which is 79 feet (24 meters) or more in length that is not required to be issued a load line under subchapter E of this chapter and that --

* * *

**(c)** Has been substantially altered on or after September 15, 1991.

**§ 28.501 Substantial alterations.**

**(a)** Except as provided in paragraph (b) of this section, a vessel that is substantially altered, including the cumulative effects of all alterations, need not comply with the remainder of this subpart, provided that it has stability instructions developed by a qualified individual which comply with §28.530 (c) through (e).

**(b)** A vessel that is substantially altered in a manner which adversely affects it stability, including the cumulative effects of all alterations, need not comply with the remainder of this subpart, provided the stability instructions required by paragraph (a) of this section are based on loading conditions or operating

restrictions, or both, which compensate for the adverse affects of the alterations.

**(c)** The following changes to a vessel's lightweight characteristics are considered to adversely affect vessel stability:

(1) An increase in the vertical center of gravity at lightweight by more than 2 inches (51 millimeters) compared to the original lightweight value.

(2) An increase or decrease of lightweight displacement by more than 3 percent of the original lightweight displacement.

(3) A shift of the longitudinal center of gravity of more than 1 percent of the vessel's length.

**(d)** In determining whether or not a vessel's stability has been adversely affected, a qualified individual must, at a minimum, consider the net effects on stability of any:

(1) Reduction of the downflooding angle;

(2) Increase in the maximum heeling moment caused by fishing gear or weight lifted over the side due to changes in lifting arrangement or capacity;

(3) Reduction in freeing port area;

(4) Increase in free surface effects, including increased free surface effects due to water on deck associated with any increase in length or height of bulwarks;

(5) Increase in projected wind area;

(6) Decrease in the angle of maximum righting arm;

(7) Decrease in the area under the righting arm curve; and

(8) Increase in the surface area on which ice can reasonably be expected to accumulate.

**§ 28.530 Stability Instructions.**

**(a)** *Intent.* The intent of this section is to ensure that vessel masters and individuals in charge of vessels are provided with enough stability information to allow them to maintain their vessel in a satisfactory stability condition. The rules provide maximum flexibility for owners and qualified individuals to determine how this information is conveyed, taking into consideration decisions by operating personnel must be made quickly and that few operating personnel in the commercial fishing industry have had specialized training in stability. Therefore, stability instructions should take into account the conditions a vessel may reasonably be expected to encounter and provide simple guidance for the operating personnel to deal with these situations.

**(b)** Each vessel must be provided with stability instructions which provide the master or individual in charge of the vessel with loading constraints and operating restrictions which maintain the vessel in a condition which meets the applicable stability requirements of this subpart.

**(c)** Stability instructions must be developed by a qualified individual.

**(d)** Stability instructions must be in a format easily understood by the master or individual in charge of the vessel. Units of measure, language, and rigor of calculations in the stability instructions must be consistent with the ability of the master or the individual in charge of the vessel. The format of the stability instructions may include, at the owner's discretion, any of the following:

(1) Simple loading instructions;

(2) A simple loading diagram with instructions;

(3) A stability booklet with sample calculations; or

(4) Any other appropriate format for providing stability instructions.

**(e)** Stability instructions must be developed based on the vessel's individual characteristics and may include the following, as appropriate for the format chosen for presentation:

(1) A general description of the vessel, including lightweight data;

(2) Instructions on the use of the information;

(3) General arrangement plans showing watertight compartments, closures, vents, downflooding angles, and allowable weights;

(4) Loading restrictions, such as diagrams, tables, descriptions or maximum KG curves;

(5) Sample loading conditions;

(6) General precautions for preventing unintentional flooding;

(7) Capacity plan or tank sounding tables showing tank and hold capacities, centers of gravity, and free surface effects;

(8) A rapid and simple means for evaluating any specific loading condition;

(9) The amount and location of fixed ballast;

(10) Any other necessary guidance for maintaining adequate stability under normal and emergency conditions;

(11) A general description of the stability criteria that are used in developing the instructions;

(12) Guidance on the use of roll limitation devices such as stabilizers; and

(13) Any other information the owner feels is important to the stability and operation of the vessel.